

Testimony of
Public Knowledge

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Hearing On: Moral Rights, Termination Rights, Resale Royalty, and Copyright Term

July 18, 2014

Dear Chairman Goodlatte, Ranking Member Conyers, and members of the Committee:

It is a privilege to submit the following testimony for the record in this hearing on copyright termination and copyright terms. Public Knowledge (PK) is a non-profit organization that advocates for the public's access to knowledge and open communications platforms.

The topics the Committee is examining in this hearing are tremendously important for encouraging creativity and protecting everyday people and professional artists alike. In this testimony, Public Knowledge urges Congress to ensure artists have meaningful access to a robust copyright termination right and to enrich the public domain by shortening copyright terms to the life of the author plus 50 years.

Copyright Termination of Transfers

The copyright reclamation right gives artists the ability to tear up their copyright transfers or licenses after 35 years. This right has the potential to transform the recorded music business. The right of authors to terminate transfers of their copyrighted works¹ has the potential to empower artists to reclaim control over their own works and promote accountability among intermediaries that aggregate artists' copyrights.²

The copyright termination right promises to empower artists across all types of creative works, but will have some unique impacts on the recorded music industry, which has traditionally been plagued by the imbalance of power between the major record labels and artists. Copyright reclamation allows recording artists to take their sound recording copyrights back from the record labels, which have for decades relied on owning massive catalogs of copyrights for their business models. For too long the music industry's incumbent middlemen have used their leverage as industry gatekeepers to squeeze artists and consumers alike, while burdening the development of new distribution platforms that threaten to make them obsolete. But the

¹ This right is sometimes referred to as copyright termination or copyright reclamation.

² Public Knowledge's recent white paper on copyright termination and the music business give further detail on the mechanics of copyright terminations and recording contracts. See Jodie Griffin, *Rewind, Reclaim: Copyright Termination and the Music Business*, PKTHINKS (Mar. 2014), <https://www.publicknowledge.org/documents/rewind-reclaim> ("Rewind, Reclaim").

termination right, which first took effect in 2013, will allow artists to reclaim control over their own works or negotiate better deals with their current business partners.

As the termination right created in Section 203 of the Copyright Act has only just recently ripened for some musicians, Public Knowledge makes the following recommendations to Congress:

1. PK urges Congress to monitor any ongoing litigation over the termination right, authorship, and works made for hire and ensure that all artists continue to have a meaningful right to terminate.³
2. Public Knowledge also asks Congress to instruct the Copyright Office to create a form by which artists could file termination notices, to facilitate artists' exercise of their rights.
3. Finally, Public Knowledge asks Congress to consider the questions posed by licenses granted for free to the general public, such as Creative Commons or open source licenses. These licenses may be sufficiently different from typical private contracts as to merit separate treatment to protect good faith follow-on creators.

Why Should Artists Be Able to Terminate Their Contracts?

Decades after Congress gave artists the right, copyright termination has indeed turned out to be desperately needed in an industry plagued by poor treatment of artists and imbalanced power structures that only hinder new works from reaching the public.

Congress's stated reasons for creating the termination right fit into two main categories. First, the termination right was designed to protect actual artists who struck bad deals with record labels or publishers. Most of those lopsided deals were the result of the fact that even an artist who shows obvious musical promise will have relatively little leverage or savvy compared to the labels and publishers she will be striking deals with. For example, Joanna "JoJo" Levesque recently sued Background Records, a subsidiary of the major label Universal Music Group, to escape the record contract she made as a 12-year-old just entering the music business.⁴ JoJo alleged that her label refused to release her third album after she delivered multiple master recordings, failed to pay producers and thus hurt her working relationships in the industry—all of which was enabled under the terms of her recording contract because she had little to no leverage as an undiscovered act. JoJo was ultimately able to escape her record deal—10 years after the fact—but artists who were adults when they struck their deals may not be so lucky.⁵

However, with the copyright termination right, artists can have a second bite at the apple regardless of their age or their leverage when they struck their deals. For example, Prince recently announced that he had negotiated a new deal with Warner Bros. Records in which he

³ For example, the parties in two lawsuits (*Shuster v. DC Comics* and *Kirby v. Marvel Characters, Inc.*) related to copyright termination have petitioned the Supreme Court to review their cases. Both requests are still pending.

⁴ Complaint, *Joanna Levesque v. Da Family Records, LLC* (N.Y. Sup. Ct., July 29, 2013).

⁵ Gerrick Kennedy, *Exclusive: JoJo Signs Deal with Atlantic Records*, L.A. TIMES MUSIC BLOG (Jan. 14, 2014), <http://www.latimes.com/entertainment/music/posts/la-et-msexclusive-jojo-deal-atlantic-records-20140114,0,3524459.story>.

would regain ownership over his catalog.⁶ After famously breaking from his label and condemning the way major labels treat artists, reports indicate the copyright termination right has allowed Prince to reclaim his rights and strike a more fair deal that reflects his career priorities.

Congress also recognized that it can be hard for anyone to tell how successful a work will be before it reaches the market. 35 years into a deal, the termination right empowers artists to renegotiate for a royalty based on how the work actually performed in the marketplace.⁷ When a work turns out to command a higher price in the market than the original bargain contemplated, the copyright reclamation right empowers the artist to negotiate for the actual value of the work.⁸ For example, in the 1930s Jerome Siegel and Joseph Shuster collaborated to create a comic book villain named “The Superman,” which they re-worked into a hero named “Superman” and sold to Detective Comics for \$130 and a small per-page rate that lasted 5 years.⁹ Using the termination provisions available to pre-1978 works,¹⁰ the heirs re-gained the copyright in 2008, giving them the power to negotiate licenses that actually reflected the value of the comics.¹¹

Termination Can Help Create a Better Music Industry

Having the benefit of hindsight, we can also see why copyright reclamation is so desperately needed to reset the balance of power in the recorded music industry and direct more royalties to actual artists. Record industry practices have too often systematically denied equity to the very people copyright law was designed to incentivize—actual artists—while entrenching the dominance and anticompetitive incentives of the industry’s largest middlemen, like the major record labels. If a substantial number of artists use their right to terminate transfers with the largest music industry middlemen, musicians will likely retain more control over their own careers and the institutions that define the industry, and receive a more proportionate return on their works. This would in turn give record labels some incentive to treat artists better or risk losing their business when the artist’s termination right matures.

Copyright reclamation could also be a boon for the development of new online music distribution platforms. Artists who reclaim their rights will regain the ability to license with online platforms that distribute music to consumers. Or, if artists choose to continue using intermediaries to strike distribution deals, they could use copyright reclamation to move their licenses to another company. This has the potential to shake up the current power structures in the recorded music business, as major labels see their sizeable copyright catalogs shrink and

⁶ Ed Christman, *Prince Gains His Catalog in Landmark Deal with Warner Bros.; New Album Coming*, BILLBOARD (Apr. 18, 2014), <http://www.billboard.com/articles/news/6062423/prince-deal-with-warner-bros-new-album-coming>.

⁷ See H.R. Rep. No. 94-1476, at 124 (“A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”).

⁸ *Stewart v. Abend*, 495 U.S. 207, 229 (1990).

⁹ *Siegel v. Warner Bros. Entm’t Inc.*, 542 F. Supp. 2d 1098, 1102-07 (C.D. Cal. 2008).

¹⁰ See § 304.

¹¹ *Siegel v. Warner Bros.*, 542 F. Supp. 2d at 1145.

subsequently lose the leverage they have previously used to veto or demand outsized payments or ownership stakes from new distribution platforms.¹²

To date, new online distribution platforms for sound recordings have needed to get direct permission from record labels, and the dominance of the three major labels (due to their enormous copyright holdings) have given those labels the market power to burden, control, or entirely shut down new platforms that enable artists to more directly and effectively reach their fans. But, if the termination right leads to smaller copyright holdings for the major labels or more limited renegotiated contracts with artists, the majors would not be able to exercise so much control over the development of the digital music space. This could also level the playing field between the major labels and smaller distribution middlemen, who would need to compete against each other to attract artists by offering more efficient operations and better rates for the actual musician.

As detailed in Public Knowledge's white paper, the major record labels have developed a reputation for using their market power as leverage against their own artists as well as against distribution platforms.¹³ As a result, recording contracts too often give artists a disproportionately small share of the revenues from an album, and keep artists in debt to the label over the course of several album cycles. Unfortunately, a new unsigned band has little leverage against a major record label and faces an uphill battle if they want to change any of the many terms in the contract that disadvantage the artist.

The Importance of the Termination Right

Copyright reclamation does not right all of these wrongs, but it gives the artist a chance to reclaim control over her work or simply renegotiate for a better deal after they have the leverage of a proven musical career and fan base.

It could be that many artists will prefer to simply strike a better deal with the same labels they have always worked with. Or, artists may opt to terminate their contracts entirely, take back their own copyrights, and pursue an independent career using new digital platforms to handle their own distribution.¹⁴

If a critical mass of artists choose this path the termination right may actually end up having a structural impact on the music industry: as the major record labels lose the aggregated rights they had collectively leveraged to veto or burden new online distribution platforms, more

¹² See Testimony of Gigi B. Sohn on Behalf of Public Knowledge and Consumer Federation of America, *The Universal Music Group/EMI Merger and the Future of Online Music*, U.S. Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, at 6-10 (June 21, 2012), available at <http://publicknowledge.org/files/Gigi%20Sohn%20Testimony%20-%20UMG-EMI%206-21-12.pdf>.

¹³ *Rewind, Reclaim* at 8-12.

¹⁴ Many artists do indeed prefer to maintain independent music careers, even when they have the option of signing to a major label or publisher. For example, the Shook Twins recently explained why they prefer an independent music careers in an open letter to American Idol. Chris Robley, *Thanks, But No Thanks: Shook Twins Tell American Idol to Take a Hike*, THE DIY MUSICIAN (July 10, 2014), <http://diymusician.cdbaby.com/2014/07/thanks-thanks-shook-twins-tell-american-idol-take-hike/>.

entrepreneurs may invest in the distribution business and more digital platforms may arise to reach consumers in new and innovative ways.

As these changes take place, the copyright termination right also gives unrepresented groups of artists the opportunity to increase their leverage and balance the power in a system that has traditionally exploited their music without allowing them to gain equity in the institutions that control their work.¹⁵ Record label contracts are often structured such that albums will never earn back the money originally fronted by the label for an album's production and promotion, so the label never passes on any royalties to the actual artist. Even if the artist is lucky enough to "recoup" the label's expenses and begin collecting royalties, that artist still only receives a small portion of the total revenue from that recording, and gains no equity in the companies that profit so richly from the album. And as record labels now increasingly use their artists' copyrights to demand equity from online music platforms, it remains unclear whether the labels' artists' ever see any of the benefit of those ownership shares. This system of exploitation is yet greater for artists from historically underrepresented communities, like African American musicians. As Professor Kevin J. Greene put it, "While it is true that the music industry has generally exploited music artists as a matter of course, it is also undeniable that African-American artists have borne an even greater level of exploitation and appropriation."¹⁶

Open-Content Projects

Congress has established the termination provisions largely to protect authors from unremunerative transfers when they have little bargaining power, but the statute does not actually make unequal bargaining power a condition for the termination right. As a result, termination can have unintended consequences for situations that don't involve unequal negotiation leverage. One of those situations is when an author publishes a work under a free or open-source license (referred to collectively as "open-content" for this testimony). An author may use this type of license to grant the public a perpetual license to copy, distribute, and/or modify her work without needing to ask for individual permission.

These licenses, however, are very likely constrained by the termination provisions of § 203, and thus can be terminated by the original author after 35 years. Once an open-content contributor terminates her license, no future authors may rely upon that license to continue

¹⁵ See Kevin J. Greene, "Copynorms," *Black Cultural Production, and the Debate Over African American Reparations*, 25 *CARDOZO ARTS & ENT. L.J.* 1179, 1184 (2008) ("Further, given their corporate nature as successors in ownership, the class of beneficiaries (primarily music publishers and record labels) that profited at the expense of Black artists are both identifiable and continue to benefit given the long terms of copyright protection. This point is underscored by the recent copyright extension that reflected a policy choice to provide a windfall to the largest IP distributors."); Kevin J. Greene, *What the Treatment of African American Artists Can Teach About Copyright Law*, *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE*, 387 (Peter Yu ed., 2007), ("The [music] industry routinely deprived Black artists of the two fundamental predicates of intellectual property protection—credit and compensation."). For example, major record labels went decades without paying any royalties at all to legendary African American artists from the 1940s and 1950s like Muddy Waters, Wolf, Buddy Guy, Bo Diddly, and the Soul Stirrers. See Richard Harrington, *MCA to Pay Royalties to R&B Greats*, *WASH. POST* (Dec. 7, 1989).

¹⁶ Kevin J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 *Hastings Comm. & Ent. L.J.* 339, 341 (1999).

building on her work. Furthermore, if the work is intermingled within a larger project like Wikipedia or the code for an open-source computer program, it could be very difficult to accurately extract the terminating's author's contributions from the rest of the work.

Some licenses, like the GPLv3 license or Creative Commons licenses, are used with the understanding that they are irrevocable and can be relied upon by follow-on creators with certainty. However, the termination provision could raise uncertainty around whether these licenses can be fully effective.¹⁷ Even if an author wants her works available for free and does not intend to terminate, if the author dies before the termination right ripens her statutory heirs' rights under § 203(a)(2) could potentially be used to reclaim rights. Similarly, instruments that abandon copyright or dedicate works to the public domain¹⁸ do not yet have substantial caselaw addressing their continued enforceability despite the termination provisions."

Open-content brings a number of benefits to society, including: minimizing transaction costs, facilitating uses that would not otherwise occur, creating a commons of raw materials that can be used by any member of the public, and, in the software context, allowing programmers to work together outside of a large firm by letting them adapt and reuse one another's code without fear of liability.

The open-content issues could be solved legislatively in a few ways. First, the law could be amended to include a mechanism for authors to voluntarily put their works in the public domain before the end of the copyright term. Authors could still choose to use open-content licenses instead, but those licenses would likely still be terminable. This might divide advocates for artists, however, because although it gives artists another choice in how to distribute their works, it would also foreclose an author from retrieving those works from the public domain later, regardless of the commercial value of the work.

Second, the termination provision could be amended to include an exception for licenses granted overtly and explicitly to the public at large without monetary consideration. This would somewhat mirror how § 203(a) currently handles works made for hire.

Finally, the termination provisions could be amended to grant the Librarian of Congress the authority to issue exceptions from the termination mechanism. This option would be the most complicated and present the most risk. If this mechanism is not structured properly it could create even more confusion; for example, as to whether the exception applies to works existing at the time of the rulemaking or licenses drafted before the next rulemaking.

The termination right offers the opportunity to reexamine the current power structures that dominate the music industry and rebalance control and revenue based on the legitimate value that each party provides. Copyright termination has the potential to empower artists and increase artists' incentives to create new works for the public to enjoy, which ultimately serves the

¹⁷ This has never been tested in court, although the outcome might also be influenced by the courts' jurisprudence on abandonment. *See Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 483 (2d Cir. 2004) (copyright abandonment requires "(1) an intent by the copyright holder to surrender rights in the work; and (2) an overt act evidencing that intent,"); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001) ("waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it,") (quoting *United States v. King Features Entm't, Inc.*, 843 F.2d 394, 399 (9th Cir.1988)).

¹⁸ *Creative Commons Legal Code*, <http://creativecommons.org/publicdomain/zero/1.0/legalcode>.

fundamental purpose of copyright law. There are, however, many pitfalls to the copyright termination right, and it remains to be seen if the system operates as Congress and the public expects it will. If powerful copyright owners and licensees are able to avoid or diminish the benefits that copyright termination provides to artists, consumer advocates, artist representatives, and Congress must be ready to remedy the system and ensure that copyright reclamation actually serves its purpose.

Copyright Term

The length of copyright protection is a crucial factor to copyright law's success in enabling people to experience and build on their own cultural foundations. At its core, copyright law exists to benefit the public, which it does by incentivizing authors to create through the grant of temporary monopolies.¹⁹ It is clear that, while a certain level of copyright protection ultimately serves the public interest, *more* is not always *better*. Both as a matter of Constitutional requirement and wise public policy, there must come a time when we recognize works' place in the cultural commons we all enjoy and build upon, and limit the term of copyright.

It has also become evident that the current term of copyright protection is too long, resulting in an increasingly outdated public domain and exacerbating the orphan works problem. Public Knowledge therefore urges Congress to limit the term of copyright protection to life plus 50 years, and to investigate the copyright term that would best incentivize creation while maximizing the availability of works to the public, with a heavy emphasis on economic analysis.

Although originally set at 14 years (with an option to renew for a second 14 year term), a succession of bills have extended the length of copyright protection for most works to the entire life of the author plus an additional 70 years. Expanding the term of copyright comes at a cost. By giving an author a monopoly on an expression, it prevents other people from building on that expression to create new works. Shortening the term of copyright to life plus 50 years would enrich the public domain by shortening the term of protection, while still maintaining compliance with international treaty obligations.

The proposal shortens copyright terms to the minimums established by the Berne Convention on the Protection of Literary and Artistic Works. This reduces the copyright term for most works to the life of the author plus 50 years, and reduces the term of protection for anonymous works, pseudonymous works, and works made for hire to 50 years from first publication. To prevent unpublished works from having an unlimited copyright term, anonymous works, pseudonymous works, and works made for hire will also have their copyright term expire 75 years from the date of their creation, if 50 years have not yet passed from the date of their publication.

Public Knowledge is not alone in questioning whether life plus 70 years is the appropriate term length. The Register of Copyrights recently suggested that Congress consider a term of life plus 50 years, with a 20-year extension contingent upon registration.²⁰ A group of prominent

¹⁹ U.S. Const. Art. I, § 8, cl. 8.

²⁰ Statement of Maria Pallante, *The Register's Call for Updates to U.S. Copyright Law*, House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet (Mar. 20, 2013), available at <http://www.copyright.gov/regstat/2013/regstat03202013.html>.

economists—including five winners of the Nobel Memorial Prize in Economic Sciences—have explained that the increase in protection from life plus 50 years to life plus 70 years gave at best a very small benefit while imposing significant costs.²¹ Given the increasing number of voices arguing that the current copyright term actually thwarts economic and cultural innovation, it falls to Congress to inquire into what term would strike the proper balance.

Finding the optimal term for copyright is a crucial part of achieving the best possible copyright law. Public Knowledge urges Congress to take one small step toward making the term of copyright protection in line with the best interests of everybody while beginning thorough economic analysis to arrive at the best copyright term to promote innovation and the creation of new works.

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²¹ Amicus Curiae Brief of George A. Akerlof et al., *Eldred v. Ashcroft*, No. 01-618 (U.S., May 20, 2002), available at <https://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>.